No. 22,557

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, a corporation,

Appellant,

vs.

BERT SIMPSON,

Appellee.

On Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLANT

CARROLL, DAVIS, BURDICK & MCDONOUGH,
J. D. BURDICK,
JOHN K. STEWART,
420 J. Harold Dollar Building,
351 California Street,
San Francisco, California 94104,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Authorities Cited

	Pages
Balff v. Public Welfare Department, 151 C.A.2d 784 (1957)	2
McGill v. City and County of San Francisco, 231 C.A.2d 335 (1964)	2, 3

No. 22,557

IN THE

United States Court of Appeals

For the Ninth Circuit

American Casualty Company of Reading, Pennsylvania, a corporation,	*Appellant,*
vs.	
Bert Simpson,	*Appellee.*

On Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLANT

Appellee argues that he continued to be an employee of the San Francisco Municipal Railway at the time of the injury on July 21, 1964 on the grounds that Mr. Mason did not notify Mr. Lewis to terminate him until July 27, 1964. In making this argument, Appellee overlooks the fact that he became absent without leave as of May 23, 1964 (RT 150:17-21) and was not eligible for reinstatement without a medical certificate explaining his absence (RT 126:24-127:9). Inasmuch as Appellee's unapproved absence was not for medical reasons, his discharge was inevitable. All that was uncertain was the timing.

In reply to the foregoing, Appellee argues that the first "acts" of the employer concerning termination took place on July 27, 1964. This argument ignores the testimony of Mr. Albert to the effect that the staff of the Civil Service Commission routinely observed payroll records of Civil Service employees to determine whether or not any of them had become absent without leave. Presumably in response to a call from the Civil Service Commission, a clerk in Mr. Ritchey's personnel department wrote on the back of Mr. Simpson's original request for leave the following inscription:

> "7-9-64—Notified Mr. Sandstrom to term.
> —has not covered sick leave." (Exhibit A)

The inscription indicates that Mr. Simpson's employer instituted steps prior to July 21, 1964 concerning his termination, but for some reason Mr. Sandstrom, who was filling in for Mr. Lewis at the time, filled out an additional discipline report instead of terminating Mr. Simpson (Exhibit 7).

In support of his argument that he was a full-time employee of the Municipal Railway and entitled to all the benefits of his employment including his insurance policy during the time that he was absent without leave in the State of Texas, Appellee relies upon the decisions in *Balff v. Public Welfare Department,* 151 C.A.2d 784 (1957) and *McGill v. City and County of San Francisco,* 231 C.A.2d 335 (1964). This reliance is misplaced.

The decision in *Balff v. Public Welfare Department, supra,* is not pertinent as the petitioner in that

case was on an approved leave and still considered to be an employee under the Civil Service requirements as illustrated by his "right" to return to work. By contrast, Mr. Simpson could not return to work as a matter of right and one of his supervisors had been instructed to terminate him two weeks prior to his accident.

The decision in *McGill v. City and County of San Francisco, supra,* does not afford Appellee support in this action as it deals with the question of who has the ultimate authority as between the Civil Service Commission and the appointing officers to terminate Civil Service employees. The special relationship existing between the Civil Service Commission and bodies or agencies subject to its jurisdiction has no bearing on the question of when an insured is entitled to the benefits provided by a private insurance policy.

In a situation such as before this Court where the policy does not specifically enumerate those instances in which an employee will not be considered a "full-time employee", it is only reasonable to adopt certain broad, sensible guidelines as were suggested in Appellant's Opening Brief, namely the availability of employment and the right to return to work. If an individual will be entitled to the benefiits of an insurance policy which are predicated upon his status as a full-time employee until such time as the Civil Service Commission approves an order terminating the employee, it places the insuring relationship entirely dependent upon the functioning of the bureaucratic machinery of the Civil Service Commission. Under those

circumstances it would be possible for a former Municipal Railway employee who took a job as a guide in the Swiss Alps to be covered under the terms of the insurance contract simply because the concerned officials never got around to formally entering an order of termination or having it approved. Such a result would be beyond the pale of reason and good sense.

Finally, Appellee argues that he should be entitled to coverage inasmuch as the premiums were paid through August 15, 1964 and the policy provided that individual coverage under the policy terminated "on the first premium date following the date on which an insured person ceased to be an employee of the policyholder" (Part 4 of Exhibit 9).

This theory is not convincing, however, as the premiums were payable at the rate of $7.00 per month (Exhibit 4). Since Mr. Simpson became absent without leave on May 23, 1964 and not eligible for reinstatement, his status as an employee for insurance purposes terminated as of that date. The first premium due date following that date was either June 1, 1964 or June 15, 1964, depending on whether Mr. Simpson paid at the first of each month or in the middle of each month.

An employee should not be able to extend his insurance coverage indefinitely without reference to his employment status by the simple expediency of prepaying his insurance premiums. If that were permissible, a former employee who prepaid his premiums a year in advance would still be covered even though

he had been terminated months before the claim and had moved half way around the world during the interim.

CONCLUSION

It is respectfully submitted that the judgment of the District Court be reversed and judgment entered in favor of Appellant.

Dated, San Francisco, California,
November 25, 1968.

CARROLL, DAVIS, BURDICK & MCDONOUGH,
By J. D. BURDICK,
JOHN K. STEWART,
Attorneys for Appellant.